Simple Murder: A Comment on the Legality of Executing the Innocent

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In 1960, Charles Black wrote an elegant, witty and powerful response to critics of Brown v. Board of Education, particularly addressed to Herbert Wechsler’s famous article Toward Neutral Principles of Constitutional Law. Wechsler had lamented that although he believed the desegregation decisions would make an enduring contribution to the quality of our society, he had serious doubts whether the decisions rested on neutral legal principles, in the absence of which the decisions could have no legitimacy.

Black responded that indeed these decisions could be justified, through reasoning which might be difficult to accept because it was so unsubtly, unfashionably simple. The equal protection clause forbids using the laws of the states to significantly disadvantage blacks. Segregation is a massive intentional disadvantaging of blacks by state law. How do we know this? His words bear repeating:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

Black was describing the situation in which a startlingly obvious principle can’t seem to find legal recognition. In Black’s words, it is obvious to everyone, including the Justices as individuals, that

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4. Id. at 424.
segregation intentionally fosters inequality for blacks.\(^5\) If there is no ritually sanctioned way in which the Court, as a Court, can learn this, "legal acumen has only one proper task—that of developing ways to make it permissible for the Court to use what it knows; any other counsel is of despair."\(^6\)

Upon reading \textit{Herrera v. Collins},\(^7\) I was struck by the aptness of Black’s response, and by its relevance to the question posed by \textit{Herrera}. Another startlingly obvious principle, which has difficulty finding legal recognition, is that the judicial system should not participate in the execution of innocent people. When a doctrine permits a result so far removed from our collective sense of justice, it is time to re-examine that doctrine.

At this point, of course, numerous complications, limitations and hedges begin to crowd in. Much depends on the way the proposition is phrased, and, however it is phrased, there are those who will take issue with it. But Charles Black slightly overstated his proposition too.\(^8\)

All hedging aside: the question presented in \textit{Herrera} was whether the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted.\(^9\) If a negative answer to this question is solemnly propounded, I suggest that laughter is an appropriate response.

Specifically, \textit{Herrera} held that federal habeas corpus is not available merely to hear claims of actual innocence, because habeas is a vehicle only for the adjudication of constitutional claims. The Court rejected Herrera’s contention that the Eighth and Fourteenth Amendments of the Constitution are violated by executing an actually innocent person without providing a forum for hearing the newly discovered evidence which bears on his claim of innocence.\(^10\) Under \textit{Herrera}, therefore, a claim of innocence is not a

\begin{itemize}
  \item 5. Id. at 427.
  \item 6. Id. at 428.
  \item 8. It was not obvious to all that segregation intentionally fostered inequality—indeed, this was one of the premises Wechsler questioned. Wechsler said:
    \begin{quote}
      In the context of a charge that segregation \textit{with equal facilities} is a denial of equality, is there not a point in \textit{Plessy} in the statement that if ‘enforced separation stamps the colored race with a badge of inferiority’ it is solely because its members choose ‘to put that construction upon it’?
    \end{quote}
    Wechsler, \textit{supra} note 2, at 33.
  \item 9. 506 U.S. at 398.
  \item 10. Chief Justice Rehnquist's majority opinion assumed for the sake of argument that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. at 417. Justices
\end{itemize}
constitutional claim and must be accompanied by an independent allegation of unconstitutionality to be cognizable on habeas.\textsuperscript{11}

This Article argues that the execution of an innocent person violates the Eighth and Fourteenth Amendments. There can be no sufficient constitutional justification for taking innocent life. Therefore, when a petitioner seeks to present newly discovered evidence tending to prove his innocence, he is entitled to a forum for presentation of that evidence. Such a forum is a necessary procedural safeguard against the deprivation of innocent life. Since the execution of an innocent person, standing alone, ought to be considered a violation of the Constitution, it should be cognizable on habeas corpus without the need to allege an additional constitutional violation.

Part I argues that executing the innocent is unconstitutional and that courts must provide a forum for the consideration of newly discovered evidence likely to demonstrate actual innocence. Part II demonstrates that current law, especially in light of \textit{Herrera}, is inadequate to protect the actually innocent from execution. Part III examines some of the remedial issues raised by the right to present newly discovered evidence.

\section{The Right to Present Newly Discovered Evidence}

The argument for a right not to be executed when innocent raises difficult definitional issues. Guilt and innocence, in the legal context, can have meaning only to the extent there is a procedure for their determination.\textsuperscript{12} "In state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant."\textsuperscript{13} Upon conviction, the defendant loses the presumption of innocence. In what sense, then, can a convicted person be termed actually innocent?

The universe of claims of actual innocence after conviction can

\textsuperscript{11} O'Connor and Kennedy concurred, asserting that there is a fundamental legal principle that executing the innocent is inconsistent with the Constitution, but that Herrera was not innocent. \textit{Id.} at 419. Justices Scalia and Thomas concurred, asserting that had the question been decided, the answer would have been that there is no right to judicial consideration of newly discovered evidence of innocence after conviction. \textit{Id.} at 427-28. Nevertheless, they joined the entirety of the Court's opinion. Justice White concurred, assuming that a persuasive showing after trial of actual innocence would render the petitioner's execution unconstitutional, but finding that Herrera had not made such a showing. \textit{Id.} at 429. Justices Blackmun, Stevens and Souter dissented, arguing that the execution of an innocent person violates the Eighth and Fourteenth Amendments. \textit{Id.} at 431-41.


\textsuperscript{13} Herrera, 506 U.S. at 416.
be divided into three categories. First, there are claims that the evidence presented at trial did not establish the defendant's guilt beyond a reasonable doubt. This article will assume that such claims are adequately addressed by Jackson v. Virginia,\textsuperscript{14} which held that a state prisoner is entitled to habeas corpus relief "if it is found that upon the record of evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."\textsuperscript{15} The second category of claims of innocence concerns defaulted issues. The petitioner in this category argues that an issue which could have been presented at trial but was not presented ought to be part of a federal court's consideration on habeas corpus. The issue will be cognizable on habeas if the petitioner can demonstrate that there was good cause for the procedural default at trial and that prejudice would result from the denial of habeas review.\textsuperscript{16} Alternatively, he may make a showing, under Murray v. Carrier, that the defaulted constitutional claim probably resulted in the conviction of one who is actually innocent.\textsuperscript{17}

The third category, and the one on which this Article will focus, consists of claims of innocence based on newly discovered evidence—evidence that had not been discovered at the time of trial and could not have been presented in any other forum.\textsuperscript{18} The question Herrera left open is whether a capital petitioner may raise on federal habeas a claim that newly discovered evidence tends to

\textsuperscript{14} 443 U.S. 307 (1979).  
\textsuperscript{15} Id. at 324.  
\textsuperscript{17} Murray v. Carrier, 477 U.S. 478 (1986); Schlup v. Delo, 115 S. Ct. 851 (1995). The Murray v. Carrier standard for actual innocence raises some of the same problems posed by Herrera, since, like Herrera, it requires a separate constitutional error to accompany an actual innocence claim. Herrera itself raised, not a default issue, but the issue of when a successive habeas petition may be filed without running afoul of the "abuse of the writ" standard. See Sanders v. United States, 373 U.S. 1 (1963) (discussing principles to be used by lower courts when reviewing successive applications for habeas corpus). McCleskey v. Zant, 499 U.S. 467 (1991), held that though the abuse of the writ concept is generally governed by the cause and prejudice standard, there is an exception where the constitutional violation has probably resulted in the conviction of one who is actually innocent. See also Sawyer v. Whitley, 505 U.S. 333 (1992) (also holding there is an exception to the cause and prejudice standard). Nevertheless, the issue of defaulted claims is complex, and will not be addressed here. For excellent treatments of the default issues, see, e.g., Daniel Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128 (1986); Robert Cover & Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977).  
\textsuperscript{18} Herrera's newly discovered evidence was time barred since he had discovered it after the thirty day limitations period for filing a motion for new trial under Texas law and no state collateral remedies existed. Herrera v. Collins, 506 U.S. 390, 406-07, 393 (1993).
prove he is actually innocent of the crime for which he was convicted, where he has no separate constitutional claim to accompany his claim of innocence.

The answer is, as Charles Black would say, unsubtly and unfashionably simple. This Article argues that the execution of an innocent person is unconstitutional under both the due process clause and the Eighth Amendment.¹⁹ To safeguard against the wrongful deprivation of life, these constitutional provisions require an adequate forum for the consideration of newly discovered evidence tending to demonstrate the innocence of a capital petitioner. This right to present newly discovered evidence in support of claims of innocence exists independent of the presence of any additional constitutional violation in the conduct of the defendant’s trial. Therefore it is cognizable on federal habeas corpus.

For the sake of argument, this Article assumes that the hypothetical petitioner can make a sufficient threshold demonstration of actual innocence.²⁰ Certainly there will be questions about the proper threshold for the showing of actual innocence,²¹ and the threshold ought not to be set so high that it may thwart exercise of

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19. I posit that it is also unconstitutional to imprison a noncapital defendant who has been denied a forum for presentation of newly discovered evidence demonstrating the likelihood of his innocence. Most, but not all, of the arguments supporting the right in capital cases apply in noncapital cases as well. Further discussion of this issue is outside the scope of this article.

20. Herrera's claim was extremely weak—a poor vehicle for raising the actual innocence issue. Herrera was convicted based on eyewitness identification and substantial physical evidence, including a note written by petitioner which strongly implied that he had committed the crime. 506 U.S. at 394-95. His newly discovered evidence consisted of two affidavits claiming that petitioner's deceased brother had admitted committing the crime. 506 U.S. at 392-96. An example of a case which would clearly meet the threshold is People v. Cruz, 643 N.E.2d 636 (Ill. 1994), in which the newly discovered evidence consisted of the credible confession of another man, Brian Dugan, that he had killed the deceased, as well as DNA evidence consistent with Dugan's guilt and Cruz's innocence. See also Barry Siegel, Presumed Guilty, L.A. Times, Nov. 1, 1992 (Magazine), at 18 (a detailed description of the Cruz story).

21. Various formulations have been suggested for defining the threshold a petitioner must meet to introduce newly discovered evidence. See, e.g., Herrera, 506 U.S. at 417 ("a truly persuasive demonstration of 'actual innocence' made after trial would render execution of a defendant unconstitutional . . . [but] the threshold showing for such an assumed right would necessarily be extraordinarily high"); id. at 420-21 (White, J., concurring) (whether, based on the newly discovered evidence and the entire record before the convicting jury, the petitioner can prove by clear and convincing evidence that no reasonable juror would find him guilty beyond a reasonable doubt); id. at 442 (Blackmun, J., dissenting) (petitioner must show that he probably is innocent); Eric Freedman, Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases, 18 N.Y.U. Rev. L. & Soc. CHANGE 315 (1990-91) (because of new evidence bearing on guilt, excusably discovered since trial, there is now probable cause to believe that a new jury might reach a different outcome).
the right. However, my focus here is not on defining the precise contours of the remedy, but on establishing that the right does exist and that an effective remedy is required for its effectuation.

A. The Due Process Clause

In Herrera, the Justices argued about whether the petitioner’s claim for habeas relief was grounded in a right to substantive or procedural due process. Chief Justice Rehnquist’s argument was as follows, “The question before us . . . is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his “actual innocence” claim. This issue is properly analyzed only in terms of procedural due process.”

Chief Justice Rehnquist accused Justice Blackmun of putting the cart before the horse for assuming that the petitioner was innocent; Justice Blackmun, in turn, accused Chief Justice Rehnquist of putting the cart before the horse for denying the petitioner the opportunity to bring his actual innocence claim because a jury had previously found him guilty. Rather than attempt to resolve the horse versus cart debate, I suggest that the right is so fundamental that it easily meets the standards for both procedural and substantive due process. More accurately, in this particular context, the horse/cart split is misleading. The right has, inextricably, both substantive and procedural elements.

The execution of an innocent person should be held to violate substantive due process because it is an unconstitutional deprivation of life. It is unconstitutional to deprive a person of life without sufficient justification. It is difficult to imagine a sufficient justification for depriving an innocent person of his life. The principle of substantive due process is that a law adversely affecting an individual’s life, liberty or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective. As the Court said in Schlup v.

23. 506 U.S. at 406 n.6.
24. Id.
25. Id. at 435 n.5 (Blackmun, J., dissenting).
26. In other words, at the risk of oversimplifying, whether the claim was that it is unconstitutional to execute innocent people, or whether it is unconstitutional to execute people without first affording a hearing to determine their guilt or innocence.
"The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." The government can have no legitimate justification for executing an innocent person. To execute a person known to be innocent, as Justice Blackmun said, "comes perilously close to simple murder."

Chief Justice Rehnquist's point in response to the due process argument in Herrera can be characterized in two ways: (1) that we can never know whether the petitioner is actually innocent, since he is not entitled to a hearing, or (2) that legally, he can never again be considered innocent, since he has already been convicted. As to the first characterization, Rehnquist observed in Herrera that "the trial is the paramount event for determining the guilt or innocence of the defendant." Moreover, there is no established constitutional right to direct appeal from a conviction. (It should be noted, however, that in the capital context the constitutionality of state death penalty statutes has been predicated on the existence of such review). Thus Rehnquist's argument appears to be that the petitioner has received all the process he is due and therefore we can never reach the issue of his substantive entitlement to life. Rehnquist's argument may seem merely tautological: there is no entitlement to more process because no more process is due. But it reflects an implicit balancing of those factors—finality, fairness, administrative convenience—which underlie the due process determination. The particular balance for which the majority argues is hard to defend. Given the overriding importance of the right at stake, the government must provide adequate procedures to ensure that arbitrary deprivations do not occur. Thus the substantive due process right not to be executed when innocent must

29. Id. at 866.
30. 506 U.S. at 446 (Blackmun, J., dissenting).
31. 506 U.S. at 416.
32. McKane v. Durston, 153 U.S. 684 (1894) (holding that states need not provide appellate review of criminal convictions). But see Marc M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 UCLA L. Rev. 503 (1992) (evaluating arguments in support of the right to a criminal appeal); Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners? 92 Mich. L. Rev. 862 (1994) (arguing that such a right exists); James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice & Procedure § 2.4e, at 74 n.313 (2d ed. 1994) (also arguing that there is a right to appeal a conviction that resulted in incarceration).
be accompanied by procedures to enable innocence to be demonstrated. The existence of newly discovered evidence creates a situation in which the trial could not have provided a full and fair hearing on all the relevant factual and legal issues. This is an elemental procedural due process problem, and one which does not require grappling with the difficult issue of a right to appeal or other corrective process. When evidence is newly discovered after trial, the right to present it is akin to a first trial or a first factfinding hearing, rather than a review of another factfinder's determination.  

Although there is some question of the appropriate procedural due process test to apply in a post-conviction context, the choice of test is unimportant. Under either test, the same factors are being weighed: the innocent petitioner's interest in not being executed, the danger of erroneous deprivation—which is by definition extremely high—and the state's interest in finality. The result under either test must be a finding that denial of the opportunity to present evidence which could prevent such erroneous deprivation of life is a violation of due process. The weight of the petitioner's interest in not being arbitrarily deprived of his life is so fundamental that it easily outweighs the costs of providing additional process. The substantive right not to be executed if innocent is empty unless accompanied by a procedural means of determining innocence.  

At this point the first characterization folds into the second: that legally, the petitioner can never again be considered innocent, since he has already been convicted. Perhaps Justice Rehnquist or Justice Scalia would disagree with the above balancing, and would
argue that the principle of finality is so important that it simply defines what is "enough" procedure, and outweighs the importance of ensuring that an innocent person not be executed. Procedural due process balancing tests necessitate weighing values like finality, administrative convenience, and the right not to be arbitrarily executed, and they provide no inherent criteria for assigning relative values. Indeed, as Justice Rehnquist observed, Mathews v. Eldridge and similar balancing tests promote ad hoc, subjective judgments of the underlying interests at stake. More to the point, balancing tends to put all interests on the same plane, thereby weakening the force of fundamental guarantees.

How, then, can it be determined whether the interest in finality ought to outweigh the right not to be arbitrarily executed? It may be helpful to examine the finality interest more closely. The interest in finality encompasses several overlapping concerns, which can be summarized as judicial economy, repose, deference to the court issuing the initial judgment, and the appearance of orderly process. Many of these interests are not served by the refusal to entertain newly discovered evidence.

It is useful to consider these questions in light of Paul Bator's article on finality in habeas corpus, since that work has so profoundly influenced the habeas jurisprudence of the Rehnquist Court. Bator believed that questions of ultimate fact, such as the question of guilt or innocence, are unanswerable, and that therefore great weight should be accorded to the finality of the trial verdict. Chief Justice Rehnquist's comment in Herrera that there is

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36. Justice Rehnquist does not seem willing to go this far, since he at least assumes arguendo that a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional. 506 U.S. at 416. However, Justice Scalia does seem willing to accept this proposition. See id. at 427-29.


41. Bator, supra note 40.

42. I do not mean to suggest that I agree with Bator's analysis, or that it commands universal acceptance. It has been widely criticized. See, e.g., Gary Peller, In Defense of Federal Habeas Corpus Relitigation, 16 HARV. C.R.-C.L. L. REV. 579 (1982) (critiquing the process orientation model of habeas advanced by Bator). My point is rather that even under Bator's stringent view of habeas relitigation, consideration of newly discovered evidence is necessary.

43. Bator, supra note 40, at 447.

44. Louis Michael Seidman, Factual Guilt and the Burger Court: An Examination of
no guarantee that the guilt or innocence determination would be any more exact at a retrial reflects this attitude. Yet Justice Rehnquist's comment is simply incorrect, as Bator would likely have agreed. If the trial court was not in possession of material facts bearing on the question of guilt or innocence, then its decision was not "exact," and the decision of a subsequent court in possession of these facts would, by definition, be more accurate.

Bator said:

It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case: the state must provide a reasoned method of inquiry into relevant questions of fact and law . . . If a state, then, fails in fact to do so, the due process clause itself demands that its conclusions of fact or law should not be respected: the prisoner's detention can be seen as unlawful, not because error was made as to a substantive federal question fairly litigated by the state tribunals, but because the totality of state procedures did not furnish the prisoner with a fair chance to litigate his case.

Bator repeatedly distinguished between relitigation of factual and legal issues already presented to the trial court, which he generally disfavored, and those situations in which no institution has yet considered all relevant factual or legal issues. The opportunity to present newly discovered evidence falls into the latter and not the former category.

Bator was also concerned that the promise of endless reconsideration would belie the possibility of just condemnation which lies at the heart of the criminal law. But he distinguished just condemnation from complacency, and so must we. The refusal to consider new evidence relevant to guilt renders the condemnation unjust—an exercise of raw power. Prisoners who believe they are unjustly incarcerated will not find repose in the finality of their sentences. Nor, one hopes, would executing the innocent reassure

Continuity and Change in Criminal Procedure, 80 Colum. L. Rev. 436, 458 (1980).
46. Bator, supra note 40, at 456.
47. Note, however, that Bator did not argue against appellate review of convictions. He recognized the possibility of "error, oversight, arbitrariness and even venality" inherent in allowing the decisions of a single institution to go unchecked. However, he saw the major purpose of appellate review to be the preservation of uniformity, rather than the reconsideration of factual and legal issues made by competent courts. Bator, supra note 40, at 453. See also Arkin, supra note 32, at 567 (Bator's position leads to conclusion that the defendant must be given at least one bite of the post-trial apple).
49. Id. at 452.
50. Susan Bandes, Taking Justice to its Logical Extreme: A Comment on Teague v.
society at large that justice and orderly process prevail. 51

The concern for deference to the issuing court is likewise irrelevant in the situation in which the issuing court had no opportunity to consider the evidence in question. Jackson v. Virginia 52 assumes a federal right to be convicted only on sufficient evidence, and permits the reviewing court to redetermine the sufficiency issue through a review of the trial record. Herrera presents a situation in which such a review is impossible, because not all the relevant evidence is in the trial record. 53 What was correct or rational at trial is no longer necessarily so. The reviewing court, therefore, unlike the court in a Jackson situation, is not reweighing what has already been weighed, or calling into question the trial court's original determination. If the need for independent review outweighed concerns for deference in Jackson, the need for initial consideration of the evidence should not be problematic in a situation in which deference is not at issue.

The sole remaining value, then, is judicial economy. Should the Court refuse to revisit convictions in which substantial new evidence of innocence exists because of the expense, delay and inconvenience it would cause to the judicial system? 54 Once the argument reaches this point—if we are really arguing judicial economy versus executing the innocent—what can one say? It may be time to return to Charles Black, who might say at this juncture: "Here I must confess to a tendency to start laughing all over again." 55 In a talk Black gave on the subject of the death penalty, he addressed the question of whether the state's interest in avoiding trial—which he characterized as basically an interest in economy—is great enough that we can be willing to execute people for not serving it. And he suggested: "[L]et us dash a little cold water on our faces and ask freshly, 'Can we really stomach this?' " 56

Lane, 66 S. Cal. L. Rev. 2453, 2459 (1993).

51. See Walter C. Long, Appeasing a God: Rawlsian Analysis of Herrera v. Collins and a Substantive Due Process Right to Innocent Life, 22 Am. J. Crim. L. 215, 228-31 (1994) (arguing that the knowledge that the system would permit mistakes leading to the execution of the innocent would destabilize the expectations of the citizenry).


54. For an argument raising concerns about the drain on judicial resources in the Herrera context, see Barry Friedman, Failed Enterprise: the Supreme Court's Habeas Reform, 83 Cal. L. Rev. 485, 544 (1995). But see Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 322-23 (1988) [hereinafter Friedman, Tale of Two Habeas] (arguing that the common law writ of habeas corpus cuts through all forms to go to the heart of a contested incarceration, and therefore can and should accommodate claims of actual innocence).

55. Black, supra note 2, at 424.

B. The Eighth Amendment

Does it violate the prohibition against cruel and unusual punishment to execute an innocent person? Quoting Charles Black again, "The case seems so onesided that it is hard to make out what is being protested against . . . ." Justice Blackmun must be correct that "it is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency'. . . . Indeed . . . with any [imaginable] standard of decency" and that it is "nothing more than the purposeless and needless imposition of pain and suffering." It is neither evenhanded, rational nor consistent. Or as one commentator concluded with admirable understatement, execution of an innocent would not deter other crimes.

Chief Justice Rehnquist never directly engaged Justice Blackmun's Eighth Amendment argument. That is, he never refuted, or even addressed, the contention that it is cruel and unusual punishment to execute an innocent person. In fact, his response is a chilling illustration of Charles Black's general point that sometimes lawyers and judges get so caught up in the minutiae of lawyering as to lose sight of basic, universal human principles. Rehnquist's sole response to the Eighth Amendment argument was to distinguish, on narrow and questionable grounds, two Eighth Amendment cases cited in Blackmun's dissent: Ford v. Wainwright and Johnson v. Mississippi. Blackmun cited these cases for the proposition that "capital defendants may be entitled to further proceedings because of an intervening development even though they have been validly convicted and sentenced to death." Rehnquist distinguished Ford on the ground that it dealt with the constitu-

57. Black, supra note 2, at 427.
61. For a recent discussion of this point in reference to Wechsler's article on neutral principles, see Martha Nussbaum, Poets as Judges: Judicial Rhetoric and the Literary Imagination, 62 U. Chi. L. Rev. 1477, 1482-86 (1995).
62. 477 U.S. 399 (1988). Ford held that where a petitioner had been validly sentenced to death and later exhibited signs of insanity, the state of Florida was required under the Eighth Amendment to provide an additional hearing to determine whether he was competent to be executed. Id.
63. 486 U.S. 578 (1988). Johnson held that where a petitioner had been sentenced to death based on three aggravating circumstances, and one of these later became invalid, the Eighth Amendment required review of the sentence because the jury had been allowed to consider evidence that has been revealed to be materially inaccurate. Id.
tionality of the sentence and not the conviction. He distinguished *Johnson* on the ground that in that case, unlike *Herrera*, state remedies were available to the petitioner so there was no need to override state law.\(^{65}\)

In short, this is the horse and cart problem again. If there is an Eighth Amendment right not to be executed when innocent, the lack of a state remedy is not a problem: enforcement of the right requires the creation of a remedy, even if this means overriding state law. Like the substantive due process right, the Eighth Amendment right is perfectly empty unless there is a means of establishing innocence.\(^{66}\) Rehnquist suggests, without quite saying it, that the remedial difficulties posed by revisiting capital convictions and sentences are so onerous that they preclude recognition of the right.\(^{67}\) But this just collapses into the judicial economy argument considered earlier.

Similar problems afflict the contention that the Eighth Amendment applies solely to the sentence and not to the conviction. It is the state which subjects the petitioner to both trial and sentence, in this case a sentence which is irrevocable when carried out. The sentence has no validity independent of its appropriateness in light of the crime for which it was meted out. For the state to carry out such a sentence where a change in circumstances has robbed it of legitimacy is an act of raw and arbitrary power. The state has the responsibility to provide a mechanism to prevent such occurrences, and if it fails, the federal courts must step into the breach.

If one accepts the argument that there is a constitutional right not to be executed when innocent, then claims of innocence become cognizable on habeas. That is, since the innocence claim is itself a constitutional claim, it need no longer be accompanied by an additional constitutional violation to qualify for relief on federal habeas corpus.\(^{68}\) Alternatively, states may be required to provide adequate collateral vehicles for presentation of newly discovered evidence. These changes are necessary, since current law is inadequate to accommodate claims of newly discovered evidence, as

\(^{65}\) 506 U.S. at 406. Justice Blackmun responded that the Court had considered state practice in the *Johnson* case only to determine whether there was an independent and adequate state ground preventing it from reaching the merits of Johnson's claim, and not to determine whether an Eighth Amendment violation had occurred. 506 U.S. 432 n.3 (Blackmun, J., dissenting).

\(^{66}\) Berger, *supra* note 12, at 1012.

\(^{67}\) See, e.g., 506 U.S. at 401 (few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence).

\(^{68}\) This is not to imply that the Court is correct in requiring an independent constitutional violation to accompany an innocence claim. See *infra* text accompanying notes 85-87.
Part II will demonstrate.

II. THE INADEQUACY OF CURRENT LAW

The New York Times recently told the shocking but not uncommon story of two people convicted of a murder it was now clear they did not commit, who have no legal means to establish their innocence and so remain behind bars. Both have been in prison in Oregon since 1990 for the crime. Oregon courts are not required to consider evidence discovered more than five days after imposition of sentence, and as of the date of the Times article, the state courts had refused to consider the corroborated confession of another man to the slaying. And of course, according to Herrera, federal habeas corpus relief was unavailable since the sole claim was actual innocence, with no independent constitutional claim.

What should our reaction be when we are solemnly told that courts are impotent to correct this outrageous state of affairs? Even in the current cynical and intolerant climate, such situations—when they manage to command public attention—have the power to shock and confound. To understand how such a situation can occur, it is necessary to view all the mechanisms comprising the criminal justice system in tandem.

Even under the best of circumstances, new evidence may come to light after trial which materially affects the reliability of a conviction. For example, in numerous cases DNA evidence is now available which simply did not exist at the time the defendants were tried. Or new witnesses or new physical evidence may sur-


70. But see Justice Scalia’s comment in his Herrera concurrence: “If the system that has been in place for 200 years (and remains widely approved) ‘shocks’ the dissenters’ consciences . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscienceness-shocking’ as a legal test.” 506 U.S. at 428 (Scalia, J., concurring).

71. See, e.g., Jenkins v. Scully, 1992 WL 32342 (W.D.N.Y. 1992) (court permits petitioner to present newly discovered evidence in the form of DNA fingerprinting, which did not exist at the time of trial); Sewell v. Indiana, 592 N.E.2d 705 (Ind. App. 3d Dist. 1992) (convicted rapist entitled to discover DNA comparisons which were unavailable at time of trial); People v. Callace, 573 N.Y.S.2d 137, 139 (N.Y. Sup. Ct. 1991) (DNA analysis is newly discovered evidence since not generally accepted by courts at time of trial); Commonwealth v. Reese, 663 A.2d 206, 208 (Pa. Super. Ct. 1995) (postconviction petitioner granted request
face which could not have been discovered earlier, despite due diligence. Moreover, the best of circumstances rarely obtain in capital cases. Witnesses perjure themselves, and the perjury is covered up and goes undiscovered until statutes of limitations have passed. Confessions are coerced, and evidence of the coercion surfaces too late. Exculpatory evidence is suppressed, and the suppression is covered up until it is too late.

All these problems occur in a context in which even the best intentioned defense counsel works under conditions which make thorough investigation difficult, including inadequate preparation time, pitiful attorney fees, and scarce if any funds for investigation for DNA testing as it was not available at trial). See also Don Terry, After 18 Years in Prison, 3 Are Cleared of Murders, N.Y. TIMES, July 3, 1996, at A8 (three men who had spent eighteen years on death row for a murder they had not committed were freed based on new DNA evidence, witness recantations and a jailhouse confession by a man who said he and his brother committed the crime).


73. See, e.g., Honor and Trust in the Cruz Case, CHI. TRIB., Nov. 6, 1995, at 12 (editorial); Eric Zorn, Recantation Lends More Ammunition for Cruz’s Freedom, CHI. TRIB., Sept. 28, 1995, at 1; Maurice Possley, The Nicarico Nightmare; Admitted Lie Sinks Cruz Case, CHI. TRIB., Nov. 5, 1995, at 1; Alex Rodriguez & Tom Frisbie, Cruz Cop Faces Perjury Probe, CHI. SUN-TIMES, Nov. 7, 1995, at 8. These articles detail the eventual discovery, during Cruz’s third trial for killing Jeanine Nicarico, that several sheriff’s investigators had perjured themselves when testifying that Cruz had confessed to the crime. See also Richard Moran & Joseph Ellis, Too Many Innocent People are Executed, ST. PETERSBURG TIMES, March 11, 1989, at 14A (editorial referring to the knowing use by the prosecution of perjured testimony in the Randall Adams case). See also Welsh S. White, The DEATH PENALTY IN THE NINETIES 39–43 (1991) (discussing the Randall Adams case).


75. See Zorn, supra note 73, at 1 (witness recants ten years after his statement implicating Cruz, claiming he was coerced into falsely accusing Cruz of murder).

76. See Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (discussing the discovery that the Chicago Police routinely keep a second set of files, called “street files”, containing exculpatory evidence that they plan not to turn over to the defense, and detailing the conspiracy to conceal evidence that police knew they were charging the wrong man with rape and murder and had willfully failed to follow up evidence about the true perpetrator). See also Rodriguez & Frisbie, supra note 73, at 8 (discussing suppression of police reports in the Randall Adams case). See also 1 LIEMAN & HERTZ, supra note 32, § 7.1a n.38 (noting that, in McCleskey v. Zant, 111 S. Ct. 1454 (1991), the “petitioner [was] denied relief . . . and ultimately executed despite probably meritorious constitutional claim because, at time of initial state postconviction proceeding, counsel accepted state officials’ word during discovery that they had not planted jailhouse informant in petitioner’s cell, when in fact they had done so”).
and experts. To exacerbate matters, ineffectiveness of counsel in capital cases is commonplace. Ineffective assistance is a one-two punch. Not only does it raise an often insuperable hurdle to timely discovery of evidence, the ineffectiveness claim itself often cannot be raised on direct appeal and its full contours may not become evident for some time. It ought to (but cannot) go without saying that death is different, because time passes as these endemic problems keep evidence from coming to light, and once the sentence is carried out, there is no going back to correct error. Thus ensuring adequate avenues for considering newly discovered evidence when it does come to light ought to be a priority. The reality is very different.

The three possible avenues for raising newly discovered evidence are federal court, state court, and a petition to the governor for executive clemency. Under current conditions, all are inadequate.

A. Federal Court

The habeas corpus statute, 28 U.S.C. 2254(d), provides, in relevant part, that:

the findings of a state court [in the applicable state proceeding] shall be presumed to be correct unless ... (2) the material facts were not adequately developed at the State court hearing or (6) the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.


79. Where proof of ineffectiveness rests on evidence outside the trial record, for example in cases of failure to investigate or conflict of interests, that proof must be developed in an evidentiary hearing. Even if the evidence is available at the time of direct appeal, it cannot be raised on direct appeal since it is outside the trial record. Moreover, some ineffective assistance claims may arise from counsel's failure to perfect an appeal, to raise issues on appeal, or from other conduct which may not be obvious until the appellate process is completed.
Townsend v. Sain\(^80\) identified those situations in which not only was no presumption of correctness accorded to the state finding, but the federal court was mandated to conduct an evidentiary hearing. Townsend held that the state hearing was inadequate, and a federal hearing mandatory, if there was an allegation of newly discovered evidence that could not have been reasonably presented to the trier of fact.\(^81\) Thus under both 2254(d) and Townsend, an allegation of newly discovered evidence precludes reliance on the state judgment, since it was not based on a full and fair hearing, and therefore mandates a federal hearing.

However, Townsend observed that the "evidence must bear upon the constitutionality of the applicant's detention: the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."\(^782\) It was this dictum\(^83\) that the Herrera Court essentially reaffirmed. Herrera stands for the proposition that, except perhaps in extraordinary circumstances,\(^84\) a petitioner has no right to present newly discovered evidence bearing on his guilt or innocence to a federal court on habeas corpus unless it is accompanied by a constitutional claim.

As noted above, the Herrera problem would be obviated if the inability to present newly discovered evidence bearing on innocence was itself considered a constitutional violation, because it would then be cognizable on habeas.\(^85\) But even assuming for the moment that bare innocence claims are not constitutionally based, the habeas statute can easily accommodate such claims, as numerous commentators have persuasively argued. As these commentators point out, habeas jurisprudence has always relied heavily on the creation of federal common law to flesh out the contours of the spare statute.\(^86\) Moreover, the Court has repeatedly demonstrated its own willingness to make guilt and innocence a crucially impor-

82. 372 U.S. at 317.
83. As Justice Blackmun observed in his Herrera dissent, in which he referred to this statement as "distant dictum," neither Townsend nor any other case prior to Herrera itself had squarely faced the issue of whether the execution of an innocent person violates the Constitution. 506 U.S. at 437.
84. The Court assumed, for the sake of argument, that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. 506 U.S. at 417.
85. See supra text accompanying notes 68, 86.
86. See, e.g., Steiker, Innocence, supra note 33, at 309; Friedman, Tale of Two Habeas, supra note 54, at 322-23.
tant part of its equitable calculus in determining the availability of habeas relief. Finally, commentators argue that if federal courts have the power to hear innocence claims when yoked to unrelated and possibly unmeritorious constitutional claims, they must have the power to hear innocence claims when not accompanied by constitutional claims. Until such arguments find greater judicial acceptance, the federal courts are not available to hear claims of newly discovered evidence.

B. State Court

What are the state court options for a convicted person in possession of newly discovered evidence of his innocence? The first possible avenue would be a motion for new trial. Yet as Herrera itself documents, nearly every state requires a motion for new trial based on newly discovered evidence to be made within a fairly short time period—most of them between sixty days and two years. Exculpatory evidence may occasionally surface in the statutorily prescribed time period, but given the typical narrow window, such evidence will frequently surface too late.

The next possible line of attack is resort to state collateral remedies. All states place significant limits on the ability to raise newly discovered evidence collaterally, and some preclude introduction of such evidence entirely. To illustrate, I will focus on the state of Illinois.

In 1947, in Marino v. Ragen, the Supreme Court held that the collateral remedies offered by the state of Illinois to one who sought to challenge a criminal conviction were merely theoretical.

88. See, e.g., Steiker, Innocence, supra note 33, at 376.
90. For example Texas at the time Herrera was decided required a motion for new trial to be made within 30 days of conviction, and provided no other collateral avenues for raising newly discovered evidence, unless one places executive clemency in that category. 506 U.S. at 441. Thereafter, in the Gary Graham case, the Texas Court of Criminal Appeals held that state habeas was an appropriate avenue for Graham's claim of actual innocence. Holmes v. Honorable Court of Appeals for the Third District, 885 S.W.2d 389 (Tex. Crim. App. 1994)(en banc). Oregon provides only a five day window post-trial (see supra text accompanying note 67). See also Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 423 (1995) (at least one death penalty state—Arkansas—has recently abolished state collateral review of most federal claims, and many others have tightened procedural rules).
91. 332 U.S. 561 (1947).
92. Id. at 569.
“a procedural morass offering no substantial hope of relief,”93 "made up of entirely blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one."94 It therefore declined to require that the habeas petitioner exhaust state remedies.

Almost fifty years later, the situation in Illinois has, if anything, worsened.95 A prisoner seeking to challenge his conviction solely on the basis of newly discovered evidence of his innocence has no guaranteed method of raising his claim. The Illinois Habeas Corpus Act96 is narrowly interpreted to lie only to correct jurisdictional defects.97 The courts will not consider the facts and circumstances surrounding the offense,98 or other matters of a nonjurisdictional nature, even if premised on alleged deprivations of constitutional rights.99 Coram nobis has been replaced by a statutory remedy100 which has a two year statute of limitations (though with a culpable negligence exception).101 The Illinois Supreme Court until 1982 held, without explanation, that coram nobis would not lie to consider newly discovered evidence, but in that year reversed itself, again with no explanation.102 Nevertheless, courts frequently refuse to consider matters outside the trial record and generally refuse to conduct evidentiary hearings.103 Some commentators question the permanence of the 1982 holding.104

93. Id. at 564.
94. Id. at 567. See also Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 COLUM. L. REV. 1143, 1145 n.11 (1953) (discussing Marino and post-Marino developments in Illinois).
95. Shortly before this Article went to press, the situation in Illinois improved considerably. In People v. Washington, 1996 LEXIS 189314 (Ill.), the Illinois Supreme Court relied on the Illinois Constitution to hold that “a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process.” Id. at 8. The impact of this is that such a claim may now be brought under the Illinois Post-Conviction Hearing Act. To the extent this renders Illinois a less-than-ideal illustration of my point, it is nonetheless a welcome development. Moreover, it does not undercut the basic argument that the situation which prevailed in Illinois before today is still the situation in many states in which claims of actual innocence are difficulty or impossible to raise.
100. ILL. ANN. STAT. ch. 735, § 5/2-1401 (Smith-Hurd 1992).
103. Decker, supra note 97, at 249-50.
104. See, e.g., Decker, supra note 97, at 242. Another commentator notes that the rem-
Moreover, a bill is currently pending in the Illinois legislature to abolish statutory coram nobis.\textsuperscript{105} The Illinois Post Conviction Hearing Act\textsuperscript{106} is not intended as a means of relitigating questions of guilt or innocence.\textsuperscript{107} It is currently interpreted to require an allegation of an independent constitutional violation before newly discovered evidence can be considered.\textsuperscript{108} It has a complex statute of limitations which under no circumstances runs more than three years.\textsuperscript{109} In summary, a claim of actual innocence, standing alone, faces a confusing and daunting set of hurdles.\textsuperscript{110}

C. Executive Clemency

The \textit{Herrera} court held that executive clemency acts as the fail-safe in our criminal justice system. Although it recognized that states are not required to provide this mechanism, it found that all thirty-six states that authorize capital punishment provide for clemency.\textsuperscript{111}

Clemency is a particularly poor vehicle for consideration of claims of newly discovered evidence of innocence. Clemency is a matter of grace, not of right.\textsuperscript{112} The grant is discretionary with the

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  \item edy is most likely to lie if the elements of both perjury and newly discovered evidence are present. Ralph Ruebner, Illinois Criminal Procedure § 7.36 (2d ed. 1994).
  \item 105. H.B. 2527, 89th Gen. Assembly, 1995-96 Sess. (1995). The bill seeks to amend ch. 725, § 5/2-1401, by adding the following language: “Nothing contained in this Section or in this Article may be used to challenge a conviction or a sentence in a criminal case.” H.B. 2527.
  \item 107. People v. James, 489 N.E.2d 1350, 1353 (Ill. 1986); People v. Orndoff, 233 N.E.2d 378, 380 (Ill. 1968).
  \item 108. Under the recent decision in People v. Washington, 1996 WL 189374 (Ill.), an actual innocence claim based on newly discovered evidence is a constitutional claim and thus cognizable on post-conviction.
  \item 109. It allows commencement of an action in the shorter of two periods: up to three years from date of conviction, or up to six months from rendition of judgment in the direct appeal process or the filing due dates of a petition for leave to appeal or petition for certiorari, whichever is sooner. ch. 725, § 5/122-1.
  \item 110. In People v. Cruz, 643 N.E.2d 636 (Ill. 1994) (see supra note 22), the defendant had several meritorious constitutional claims, including a Bruton claim (Bruton v. United States, 391 U.S. 123 (1968) (precluding admission of a codefendant’s confession against the defendant)), and a claim of the admission of irrelevant evidence. These claims led to two reversals and remands of the defendant’s case during the time the evidence against Brian Dugan and Dugan’s confession were unfolding. Otherwise there may have been no vehicle for introduction of the evidence regarding Dugan. Moreover, evidence of perjured testimony which completely undermined the state’s claim that Cruz had confessed to the crime surfaced only during Cruz’ third trial. See Zorn, supra note 73.
  \item 112. 506 U.S. at 412.
\end{itemize}
governor, and the decision is rarely guided by substantive standards. Practices vary widely among the states. In other words the decision whether to grant clemency is, by definition, arbitrary and unreviewable. In real as opposed to theoretical terms, moreover, grants of clemency are increasingly rare. These are not desirable qualities for a fail-safe remedy against arbitrary execution. If indeed petitioners are entitled to a vehicle for consideration of newly discovered evidence, a discretionary, standardless, unreviewable avenue like clemency cannot meet the dictates of due process.

By its very nature, clemency assumes forgiveness for an act committed, not reassessment of guilt. The petitioner with newly discovered evidence requires a forum for consideration of that evidence. In general, either because of statutory limitations, lack of funding, lack of expertise or lack of interest, clemency boards are not in the position to conduct a meaningful consideration of new evidence.

Most fatal to the clemency petition's claim of fail-safe status is the reality of political pressure. The wisdom of entrusting elected officials with ultimate responsibility for the protection of a powerless, reviled group like capital defendants, in a political climate in which ordering executions is seen as a surefire vote-getting strategy, hardly requires comment.

The above-quoted language from *Marino v. Ragen* aptly describes more than just archaic Illinois procedures. The entire post-conviction criminal justice system, both state and federal, is often little more than a series of blind alleys, a procedural morass offer-

113. In some states the governor shares the power with an advisory board. See Berger, supra note 12, at 966.
114. Id. at 967.
115. Id. at 967; Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255, 266 (1990-91); Don Terry, *Only Hours Before Execution, A Woman is Spared in Illinois*, N.Y. Times, Jan. 17, 1996, at A10 (in his five years as governor, this is the first time Jim Edgar has granted clemency to a death row petitioner).
117. See id. at 1430 n.290 (discussing the behavior of Bill Clinton and Pete Wilson, both of whom used the refusal to commute sentences as a campaign tool). See also Bright, supra note 77, at 483-84 (discussing Bill Clinton's refusal to commute the sentence of the brain damaged Ricky Ray Rector and his scheduling of the execution just before the New Hampshire primary); Marshall Frady, *Death in Arkansas*, New Yorker, Feb. 22, 1993, at 105 (also discussing Clinton's role in the execution of Rector); Mello, supra note 72, at 28 (discussing Governor Lawton Chiles' remark that it is the court's job, not his job, to see to it that the right person is being executed); Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. Rich. L. Rev. 227, 229 n.7 (1993) (discussing governors' legitimate fear of political backlash for commutation of sentences).
ing no substantial hope of relief to the wrongly convicted. Fail-safe and backstop and last chance procedures fail to perform these theoretical functions, and what falls through the cracks is the supposed core issue of the criminal justice system: separating the guilty from the innocent. Part III considers what ought to be done to remedy this situation.

III. Closing The Remedial Gap

When a state like Illinois provides a confusing, contradictory and ultimately ineffective set of collateral remedies, it is easy to see that some judicial or legislative body needs to develop a coherent plan for reforming the situation. As Joseph Hoffman and William Stuntz recently suggested, the criminal justice system as a whole is similarly contradictory and ineffective when it comes to determining post-conviction innocence. When the system whose core purpose is the determination of guilt and innocence can find no adequate post-conviction vehicle for accommodating substantial challenges to its verdicts, skewed values are only part of the problem—albeit a large part. Another part of the problem is the ease with which each sovereignty, and all the actors within each sovereignty, can pass the buck in a concurrent federal and state system.

Numerous scholars have argued that there needs to be some forum for consideration of newly discovered evidence. Some have argued that the forum ought to be in state court. For example Vivian Berger argues that capital prisoners asserting innocence on the basis of new evidence should have a constitutional right to file a motion for new trial or similar action in state court at any time regardless of limitations periods. She believes state court is the appropriate place for such an action, since it will turn on the traditional sort of factfinding done by state criminal courts. She argues that federal courts should not be required to spend their resources second guessing the factual findings of local judges or juries on the issue of guilt or innocence. As I will argue shortly, there are also arguments for favoring federal district court hearings in this context.

My belief is that it is not crucial whether the hearing on newly discovered evidence occurs in state court or federal court. It is crucial that it occurs in some court. To return to Hoffman’s and

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120. Berger, supra note 12, at 949. See also Case v. Nebraska, 381 U.S. 336, 344-45 (Brennan, J., concurring).
Stuntz’s insight, it is important to view the entire criminal justice system—state and federal—as a system, and not a series of independent institutions. The federal district courts in habeas cases, however one chooses to define their precise mandate, and whether one categorizes their function as direct or collateral review, serve a different role from federal district courts in any other type of case. That is, they sit to review state court findings. If state corrective process is inadequate to accommodate newly discovered evidence, the federal district court may have the power to compel states to provide adequate process to avoid the frustration of federal law. In the absence of adequate state process, the federal court has the duty to conduct an evidentiary hearing on that evidence.

The federal courts do have some significant advantages when a state criminal conviction may need to be reopened. In this context, the federal forum may be preferable to the state, and it is certainly an appropriate forum. I will briefly address the issue of whether the federal forum is preferable to the state forum for consideration of claims of newly discovered evidence. The question of whether federal habeas can appropriately accommodate claims of innocence was addressed earlier, and I will close by offering just a few additional thoughts on it here.

There are several good arguments for requiring a federal forum for consideration of newly discovered evidence. As a general matter, one of the most important roles of the federal court is to remedy unconstitutional government actions which injure individuals. It is difficult to conceive of a more serious governmental injury than the preventable taking of innocent life. More specifically,
death penalty cases often require controversial and difficult decisionmaking. Particularly in high profile cases, as capital cases often tend to be, it is politically risky to tamper with a death sentence, much less a conviction. In a case in which the newly discovered evidence raises issues about the prior conduct of state officials, these political risks multiply. For non-Article III judges, these risks include loss of livelihood. This is not to suggest that elected state judges never take such risks, but rather that it is much more difficult for them than for Article III judges.

Nor are the federalism concerns very pronounced in the context of newly discovered evidence. By definition, the state court had no opportunity to consider the evidence, and therefore the usual concerns about implied insults to state competence are inappropriate. Moreover, as Hoffman and Stuntz point out, the controlling caselaw in the area of criminal procedure is largely federal, so the dual sovereignty issues which arise from conflicts between state and federal law are also less pronounced in this situation. And given that the applicable law is largely federal, the federal forum has undoubted competence to adjudicate it.

Finally, I offer a last thought about the appropriateness of the federal forum. When a federal habeas court determines the constitutionality of a petitioner's continued custody, its responsibility under Article III is to dispense justice in the particular case before

125. Indeed, in the Cruz case, a state court judge did free the defendant by granting his motion for directed verdict. See Allan Gray & Courtenay Edelhart, Judge Rules Cruz Innocent; Finally The Whole Case Just Fell Apart, Chi. Trib., Nov. 4, 1995, at 1; Janan Hanna & Stacey Singer, Cruz Judge Lambastes State Case; 'Sloppy Prosecutors Lected by Mehling', Chi. Trib., Nov. 4, 1995, at 6. Nevertheless, the spectacle of the state's attorney and other elected officials continuing to keep an innocent man on death row year after year rather than admit their mistakes in a high profile case is a case study in the way institutions tend to perpetuate injustice in order to protect their own. See also Mello, supra note 72, at 44 (arguing that "the criminal justice system, and particularly prosecutors and police, never admit they are wrong").


When a federal court permits the execution of a petitioner without considering evidence which was likely to render that execution lawless, it has, unavoidably, placed its imprimatur on a lawless execution. To do so, in the words of Cover and Aleinikoff: "make[s] innocence and guilt a mockery—a euphemistic dressing for inaction in the face of injustice." To discuss habeas purely in systemic terms, focusing on federalism implications, judicial economy, floodgates, and such aggregate issues, is to ignore the narrowest, least controversial and most crucial role of the federal courts—the duty to do justice in the individual case.

130. See Bandes, supra note 50, at 2461-62.
131. Cover & Aleinikoff, supra note 17, at 1100.